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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1153

UNITED STATES OF AMERICA

versus

SAMUEL C. CASHIO,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

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MAY IT PLEASE THE COURT:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered on the 9th day of December, 1969, in *United States of America v. Samuel C. Cashio*, Number 27,373 on the docket of said Court, and the refusal of petitioner's application for rehearing and entry of said judgment on the 6th day of January, 1970, affirming the decision of the

United States District Court for the Eastern District of Louisiana, Baton Rouge Division, Criminal Number 1513 on the docket of said Court. The decision of the United States Court of Appeals for the Fifth Circuit is not reported at this time but said decision is appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on the 9th day of December, 1969. Petition for rehearing was denied on the 6th day of January, 1970, with judgment being entered on said date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 1651(A), petitioner requesting a review of a decision of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

Should a new trial be granted where a juror admittedly withheld information when questioned during the voir dire examination and there is a possibility that the juror was biased or prejudiced against the defendant?

Should a trial court allow a defendant to interrogate a juror under oath in open court where an affidavit is secured from the juror by the government and introduced in opposition to the defendant's motion for a new trial which is based on the juror's possible misconduct?

Should a motion for judgment of acquittal be granted at the conclusion of the government's case when no proof has

been offered to prove an essential element of the crime as charged?

Should an appellate court make its determination of a motion for judgment of acquittal made at the conclusion of the government's case based on no proof as to an essential element of the crime as charged from only that evidence of record at the time the motion was made?

Is a jury entitled to make a comparison of the handwriting appearing on documents introduced by the government, but not proven to be the taxpayer's writing, with the signatures appearing on his income tax returns and decide whether he signed the income tax returns?

Does 26 USCA, Section 6064, alone, constitutionally create a rebuttable presumption that the name signed to a tax return was actually signed by the taxpayer?

Does the trial court's refusal to give a requested jury charge which states in substance that evidence of good character standing alone may create a reasonable doubt as to a defendant's guilt, constitute reversible error where the defendant has introduced considerable evidence of his good character?

STATUTORY PROVISIONS INVOKED

1. This case involves 26 U.S.C.A. 7206(1):

"Any person who: (1) Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not

believe to be true and correct as to every material matter, shall be guilty of an offense."

2. 26 U.S.C. 6064:

"The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."

STATEMENT OF THE CASE

A Federal Grand Jury meeting in New Orleans, Louisiana, returned and filed on the 19th day of April, 1963 a four count indictment against petitioner, Samuel C. Cashio. Said indictment charged that petitioner violated 26 U.S.C. 7206(1) when he willfully and knowingly made and subscribed and filed joint income tax returns for the tax years 1956 through 1959; that each of said income tax returns was verified by a declaration that it was made under penalty of perjury and he did not believe that each of said income tax returns was true and correct as to every material matter and that he reported income which he then and there knew and believed was substantially lower than his actual income for each of said tax years.

On the 24th day of September, 1968 trial began with the calling of 12 prospective jurors who were duly sworn by the Deputy Clerk. Leroy P. Alfred, No. 57 on the Jury Venire, was one of the original 12 jurors called and seated. The Court while conducting the voir dire examination asked each juror various questions concerning their acquaintance with petitioner. The Court further asked whether any of the prospective jurors had participated in any way, other than by voting,

either for or against petitioner in any of his political races or political endeavors. There were various jurors who voiced certain questions concerning their acquaintance with petitioner and their participation in political campaigns for or against him. Juror Leroy P. Alfred did not make it known to the Court that he knew petitioner, nor did he make it known that he had actively participated in political campaigns as a member of the Industrial Voter League of Iberville Parish, Louisiana, in which petitioner was a candidate for District Attorney.

Petitioner filed on the 12th day of November, 1968 a Second Supplemental and Amended Motion for Judgment of Acquittal or a new trial predicated upon the sworn affidavit of one Vincent J. Pizzolato. Affiant swore that he was acquainted with Juror Leroy P. Alfred and had contacted him relative to the Democratic Election of 1964 in which petitioner was a candidate for District Attorney. That Juror Leroy P. Alfred in substance said that he had not gotten justice from petitioner as District Attorney and his manner of getting justice was hauling people to the polls.

On January 2, 1969, the day before the date set for hearing of the above motion, an affidavit executed by Juror Leroy P. Alfred before Harry F. Connick, Assistant United States Attorney, was filed by the government in opposition to petitioner's Second Supplemental and Amended Motion for Judgment of Acquittal or a new trial. Petitioner on January 3, 1969 filed at the hearing of the above motion, a motion to interrogate said Juror as to matters contained in his affidavit and his qualifications as a Juror. The motion was denied by the Trial Court.

The government presented its case in chief and rested, whereupon petitioner out of the presence of the jury moved for a Judgment of Acquittal. In said motion it was urged that the government had not proved all of the essential elements of the crime as charged, which motion was overruled by the Trial Court. After all the evidence had been introduced, petitioner re-urged his motion for Judgment of Acquittal which was also denied by the Trial Court.

The Court of Appeals for the Fifth Circuit in its opinion held that after denial of petitioner's motion for Judgment of Acquittal at the close of the government's case, his introducing evidence on his own behalf constituted an abandonment of his motion and that the reviewing Court may consider all the evidence in the entire record.

Petitioner submitted in writing to the Trial Court and designated as defendant's Special Charge No. 17 a charge which in substance stated that evidence of good character standing alone may create a reasonable doubt as to a defendant's guilt. The Trial Court refused to give petitioner's Special Charge and gave in its place the following Special Charge:

> "The Jury might give much weight to evidence of good character, bearing in mind that when considered with **all of the other evidence**, may be sufficient in itself to create a reasonable doubt of guilt; in arriving at your verdict you must consider all of the evidence in the case." (Emphasis supplied)

The Court of Appeals for the Fifth Circuit held that the Trial Court's instruction was proper even though petitioner's requested special instructions had been approved by the Seventh and District of Columbia Circuit's.

On the 27th day of September, 1968 the jury returned a verdict finding petitioner guilty as charged on all four counts. The Trial Court suspended the imposition as to imprisonment only and petitioner was placed on unsupervised probation for a period of 2 years on each of the four counts to run concurrently. Petitioner was further sentenced to pay a fine of $5,000.00 on each of the four counts, or a total of $20,000.00. Payment of the fine was suspended pending completion of petitioner's appeal and application for writs to this Honorable Court.

ARGUMENT

I

A. A NEW TRIAL SHOULD BE GRANTED WHERE A JUROR ADMITTEDLY WITHHELD INFORMATION WHEN QUESTIONED DURING THE VOIR DIRE EXAMINATION AND THERE IS A POSSIBILITY THAT THE JUROR WAS BIASED OR PREJUDICED AGAINST THE DEFENDANT.

B. A TRIAL COURT SHOULD ALLOW A DEFENDANT TO INTERROGATE A JUROR UNDER OATH IN OPEN COURT WHERE AN AFFIDAVIT IS SECURED FROM THE JUROR BY THE GOVERNMENT AND INTRODUCED IN OPPOSITION TO THE DEFENDANT'S MOTION FOR A NEW TRIAL WHICH IS BASED ON THE JUROR'S POSSIBLE MISCONDUCT.

The selection of the jury began with the calling of twelve prospective jurors who were duly sworn by the deputy clerk. Leroy P. Alfred, number 57 on the jury venire, was one of the original twelve jurors called and seated. (AP 111)

The following are some of the questions asked every prospective juror by the Court during voir dire examination.

AP 117:

"Are there any members of the jury who are acquainted with the defendant, Samuel C. Cashio? Do you know him? Are you acquainted with him, associated with him in any way, shape or fashion? Yes, sir."

JUROR NUMBER 9 (Mr. Crochet): I know he happens to be our District Attorney.

AP 120-121:

"Are there any jurors who know of any reason why you could not act as a juror and confine your deliberations and findings to findings of fact in this case, in accordance with the Court's instructions which you will receive at the end of the presentation of evidence?

". . . Now, are there any members of the jury who know of any reason why you could not afford this defendant that presumption of innocence with which he starts the trial and which is to remain with him unless and until the contrary be proved beyond a reasonable doubt. Are there any members of the jury who know of any reason why you could not so afford that presumption?"

AP 122:

"Now, are there any members of the jury that know of any reason why you could not treat this indictment simply as an accusation rather than evidence against the defendant?

"Now the defendant in this case, Mr. Samuel C. Cashio, is district attorney for the parishes of West Baton Rouge, Iberville and Pointe Coupee. Are there any members of the jury who feel that this fact would in any way affect your ability to act as impartial jurors in this case? In other words, would this fact in any way prevent you from giving this defendant and the government, a fair, honest and impartial trial of this case?"

AP 125:

"All right. Now, are there any members of the jury who have participated in any way, other than voting if you live in those parishes—but have participated in any way either for the defendant or against the defendant in his political races or political endeavors in those areas? In other words, have any of you people been active in any campaign for the defendant or against the defendant, in any of his political activities?"

AP 126:

"Are there any members of the jury who know of any reason of any kind whatsoever why you could not serve as a juror in this case and return a just, fair, honest, impartial verdict based solely and entirely on the law and the evidence that will be presented and given to you during the course of this trial?"

AP 132:

"Let me ask you this, Mr. Banta: You say that you have known the defendant all his life and you say that you have engaged in political activities both with him and against him, I assume, on the same side or on opposite side. Would these facts impair your ability to act as an impartial juror in this case, because if they would, then

of course, you should not sit as a juror; if they would not, you have a right to sit as a juror, unless challenged by one of the parties. Now, would this—would these facts make it impossible for you to act as a completely impartial, unbiased juror in these proceedings?"

MR. BANTA: "No, Your Honor, I don't feel these facts would make me biased one way or the other, regarding this case, **but I just wanted it to be known by all parties what the facts are."**

"Yes: that is what you're supposed to do, to let us know the facts." (Emphasis supplied)

The above is only a part of the questions asked by the Court and answers by prospective jurors on voir dire examination. Leroy P. Alfred sat in the jury box while the Court repeatedly asked the above questions but at no time did he indicate that he knew petitioner. He did not advise the Court of his participation in a political campaign in which petitioner was a candidate for District Attorney. Leroy P. Alfred was, in due course, impaneled as a juror in this case.

Petitioner on the 12th day of November, 1968, filed a second supplemental and amended motion for judgment of acquittal or new trial. (AP 55) Said motion was predicated upon the sworn affidavit of one Vincent J. Pizzolato who swore that he was acquainted with Leroy P. Alfred, and had contacted him relative to the Democratic primary election of 1964 in which petitioner was a candidate for district attorney. That Leroy Alfred said in substance that he had not gotten justice from Mr. Cashio and Mr. Griffon, Sheriff of Iberville Parish, and his manner of getting justice was hauling people to the polls. Leroy Alfred exhibited a definite animosity toward Mr. Cashio and Mr. Griffon. (AP 58-59)

On January 2, 1969, an affidavit executed by Leroy P. Alfred before Harry F. Connick, Assistant U. S. Attorney, was filed by the government in opposition to petitioner's second supplemental and amended motion for judgment of acquittal or new trial (AP 61). In said affidavit, Leroy P. Alfred affirmed that he knew the parties named in the affidavit of Mr. Vincent J. Pizzolato in connection with his activity as a member of the Industrial Voters League in Iberville Parish, Louisiana. That he reported having been beaten to petitioner who was District Attorney of said parish, but that no criminal indictment was returned by the Grand Jury. Leroy P. Alfred, in his affidavit, goes to great length to explain why he did not inform the Court of his prior relationship with petitioner.

Petitioner's motion was noticed for hearing for January 3, 1969. The government waited until January 2, 1969 to file and serve petitioner with a copy of the counter affidavit executed by Juror Leroy P. Alfred. This, of course, gave petitioner no time to secure any proof other than the Pizzolato affidavit for said hearing. The testimony of Pizzolato would have served no useful purpose if it was not possible to secure the testimony of juror, Leroy P. Alfred, since their affidavits were conflicting. Therefore, petitioner at the hearing of his motion for a new trial filed a motion to interrogate said juror under oath before the Court because of the conflicts between the two affidavits.

The Court denied petitioner's motion to interrogate Juror Leroy P. Alfred, together with his motion for judgment of acquittal or new trial based on said juror's possible bias or impartiality. (AP 68) Counsel for petitioner in his argument on said motions questioned the propriety of the U. S. Attor-

ney's questioning juror, Leroy P. Alfred, out of the presence of the Court. He was informed by the Court that the questioning of Leroy P. Alfred and securing his affidavit was done with the express permission of the Court. (AP 948-949) Petitioner contends that only by the interrogation of said juror under oath in open Court could it have been determined whether he was tried by an impartial jury as guaranteed him by the sixth amendment to the Constitution of the United States of America.

The Court of Appeals for the Fifth Circuit cited at page 7 of its opinion the case of *Glasser v. U. S.*, 315 U.S. 60, 62 S. Ct. 457, for the proposition that the trial court did not err when it refused to allow petitioner to interrogate juror, Leroy P. Alfred, under oath in support of his motion for a new trial. *Glasser v. U. S.*, supra, pages 472-73:

> "Glasser, in his affidavit, offered to prove the allegations contained therein, but the record is barren of any actual tender of proof on his part. Futhermore, there is no indication that **the court refused to entertain such an offer**, if it were in fact made. Roth did not even make an offer of proof in his affidavit, and Kretske did not file one. While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted, *Carter v. Texas*, 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839, there is, and, on the state of this record, can be no assertion that such error was here committed." (Emphasis supplied)

The Trial Court in the instant case refused to allow petitioner to offer evidence in support of his allegation that juror, Leroy P. Alfred, was biased or prejudiced. If the above

pronouncements by the Supreme Court are to be given any meaning, error was committed.

The courts have been faced with the problem of jury misconduct numerous times and have repeatedly held that if there is a possibility of prejudice, the jury verdict cannot stand.

Mattox v. U. S., 146 U.S. 140, 13 Sup. Ct. 50

Parker v. Gladden, 87 Sup. Ct. 468, 385 U.S. 363

U. S. v. Kum Sen Seo, 300 Fed. 2d 623 (3rd Cir.)

Holmes v. U. S., 284 Fed. 2d 716 (4th Cir.)

Richardson v. U. S., 360 Fed. 2d 366 (5th Cir.), on remand, 376 Fed. 2d 844

Pekar v. U. S., 315 Fed. 2d 319 (5th Cir.)

A new trial was granted in a robbery prosecution where it appeared that a juror knew the defendant's mother and failed to notify the Court of this fact even though the Court was unable to determine whether the defendant had been prejudiced thereby.

U. S. v. Brown, 179 Fed. Sup. 478 (DC)

The admitted purpose of voir dire examination is to determine whether the veniremen are qualified, whether they have prejudged the case, whether their minds are free from prejudice or bias so as to enable parties to ascertain whether

cause for challenge exists and to ascertain whether it is expedient to exercise a right to a pre-emptory challenge.

Kreuter v. U. S., 376 Fed. 2d 654 (10th Cir.)

It has been held that where a prospective juror conceals a fact that would have led counsel to challenge him either for cause or pre-emptorily was grounds for the granting of a new trial.

Carpenter v. U. S., 100 Fed. 2d 716 (CA-DC)

Morford v. U. S., 70 Sup. Ct. 586, 339 U.S. 258

It is submitted that the trial court erred when it refused to grant petitioner a new trial. The refusal to allow petitioner to interrogate juror, Leroy P. Alfred, under oath before the Court did nothing to erase the doubt as to his possible prejudice or bias. The Court's action fostered the doubt that petitioner did not receive a fair trial by impartial jury as guaranteed him by the Sixth Amendment to the Constitution of the United States.

II

A. A MOTION FOR JUDGMENT OF ACQUITTAL SHOULD BE GRANTED AT THE CONCLUSION OF THE GOVERNMENT'S CASE WHEN NO PROOF HAS BEEN OFFERED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME AS CHARGED.

B. AN APPELLATE COURT SHOULD MAKE ITS DETERMINATION OF A MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF THE GOV-

ERNMENT'S CASE BASED ON NO PROOF AS TO AN ESSENTIAL ELEMENT OF THE CRIME AS CHARGED FROM ONLY THAT EVIDENCE OF RECORD AT THE TIME THE MOTION WAS MADE.

C. A JURY IS NOT ENTITLED TO MAKE A COMPARISON OF THE HANDWRITING APPEARING ON DOCUMENTS INTRODUCED BY THE GOVERNMENT, BUT NOT PROVEN TO BE THE TAXPAYER'S WRITING, WITH THE SIGNATURES APPEARING ON HIS INCOME TAX RETURNS AND DECIDE WHETHER HE SIGNED THE INCOME TAX RETURNS.

D. 26 USCA, SECTION 6064, DOES NOT, ALONE, CONSTITUTIONALLY CREATE A REBUTTABLE PRESUMPTION THAT THE NAME SIGNED TO A TAX RETURN WAS ACTUALLY SIGNED BY THE TAXPAYER.

Petitioner, Samuel C. Cashio, was charged and tried on four counts of having violated the following statute:

26 U.S.C. 7206 (1)—FRAUD AND FALSE STATEMENTS

> "Any person who—(1) Declaration Under Penalties of Perjury—willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter."

The government had the burden of proving beyond a reasonable doubt that petitioner did willfully make and subscribe the income tax returns in question; that they were verified

by a written declaration that they were made under the penalties of perjury and appellant did not believe that the information contained in said returns was true and correct as to every material matter. These are the essential elements of the crime charged.

The government called several witnesses, but offered no evidence to prove that petitioner had subscribed said tax returns. No attempt was made to prove an obviously essential element of this crime, i.e., that Samuel C. Cashio did sign or subscribe the income tax returns in question. When the government rested its case (AP 615), petitioner moved for a judgment of acquittal based on the fact that all of the essential elements of the crime had not been proved (AP 616). The Court, after hearing argument thereon, denied petitioner's motion for judgment of acquittal. (AP 618)

The government has the burden of proving every element of a crime as charged and failure thereof necessitates an acquittal.

Hiet v. U. S., 365 Fed. 2d 504 (CA-DC)

Holland v. U. S., 348 U. S. 121, 75 Sup. Ct. 127

Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353

Roe v. U. S., 287 Fed. 2d 435 (5th Cir.)

U. S. v. Cascade Linen Supply Corp., 160 Fed. Sup. 565 (SD-NY)

In a murder case, the failure of the prosecution to offer proof that the victim died would be such a failure of the prose-

cution to prove an essential element of the crime as charged and would require the granting of a judgment of acquittal since death of another is an essential element of the crime of murder. This, of course, is similar to the instant situation where the government failed and did not attempt to prove in chief that petitioner signed or subscribed the income tax returns in question.

The Court of Appeals, for the Fifth Circuit, at Page 4 of its opinion held that 26 U.S.C. 6064, as interpreted in *U. S. v. Wainwright*, 413 F. 2d 796, creates a rebuttable presumption that since petitioner's name was signed to the four income tax returns, no further proof was required to prove that he subscribed or signed said returns.

The court in *U. S. v. Wainwright* (supra) instructed the jury that from the demonstrated facts and the evidence the presumption created by 26 U.S.C. 6064 must prove beyond a reasonable doubt that the defendant had signed the tax return.

The court instructed the jury in the *Wainwright* case as to the proper weight to be given the presumption created by 26 U.S.C. 6064, but no such instruction was given in the instant case, nor did the government request such an instruction. It would have been impossible for petitioner's jury to have applied **this** statutory presumption without being properly instructed by the court.

It is submitted that the statutory presumption created by 26 U.S.C. 6064 is applicable only as a procedural aid to a tax court or commissioner in a civil matter. The application of the statute in criminal prosecutions eliminates the gov-

ernment's burden of having to prove the essential elements of a crime as charged. If extended to criminal prosecution, it would allow a person to be convicted of a crime strictly on the basis of a statutory presumption which would be contrary to the pronouncements of the United States Supreme Court in *Leary v. U. S.*, 89 S. Ct. 1532, 1545-49.

It is fundamental that the prosecution must prove every essential element of a crime and proof of an element of a crime cannot be made solely by the use of a presumption.

Imholte v. U. S., 226 Fed. 2d 585, 590 (8th Cir.)

> "These cases establish the proposition that where intent is a necessary element of the offense, is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive, that that specific intent must be proved by or clearly inferred from the evidence, Wardlaw v. United States, supra, and the proof of such intent as an ingredient of the offense may not be eliminated by a presumption. Morrissette v. United States, supra."

If it was the intention of Congress to have 26 U.S.C. 6064 apply to criminal prosecution, then said statute must be held to be unconstitutional since its application would be a denial of due process guaranteed by the Fourteenth Amendment of the United States Constitution. It would, in effect, allow the prosecution to rely on the statutory presumption as proof of an essential element of the crime and would shift the burden of proof to the defendant to requiring that he disprove the facts established thereby. From the above it seems clear that 26 U.S.C. 6064 should not have been applied in the instant case.

The citing by the Court of Appeals for the 5th Circuit of *Strauss v. U. S.*, 311 Fed. 2d 926, for the proposition that the jury was entitled to make a comparison of the handwriting which was known to be petitioner's with the signatures appearing on the tax returns seems to be erroneous. There was no document introduced by the government before it rested its case which was proven to contain appellant's genuine signature, but this, of course, was not the situation in *Strauss v. U. S.*, supra, page 932:

> "It is elementary, putting aside the expert testimony of genuineness of the signatures, that the jury was entitled to draw their own conclusion as to the genuineness of the signature on the various exhibits by a comparison with the **admitted signature of appellant** on Government Exhibit 9, the agreement between Goodman, appellant and Bolton." (Emphasis supplied)

In *Strauss v. U. S.* (supra), there was a document introduced in evidence which admittedly contained the signature of the defendant, which would distinguish it from the instant case.

The United States Court of Appeals for the 5th Circuit at Page 2 of its opinion stated:

> "It is the settled rule in this Circuit that when a defendant, after denial of a motion for acquittal at the close of government's case, introduces evidence in his own behalf, his motion is **'abandoned'** and the reviewing court may consider all the evidence and the entire record." (Citations omitted) *United States v. Gordon*, 5 Cir. 1969, 410 F. 2d 1121, 1122.

Based upon the above pronouncement the United States Court of Appeals for the 5th Circuit refused to consider only that evidence of record when petitioner moved for a judg-

ment of acquittal at the close of the government's case. Such is in conformity with the holding of 10 United States Courts of Appeal but contrary with the well reasoned opinions of the District of Columbia Court of Appeals.

Cephus v. U. S., 324 Fed. 2d 893 (CA-DC)

Franklin v. U. S., 330 Fed. 2d 205 (CA-DC)

Belton v. U. S., 382 Fed. 2d 150 (CA-DC)

Austin v. U. S., 382 Fed. 2d 129 (CA-DC)

Count v. U. S., 184 F. 2d 284 (1950), 1st Circuit

U. S. v. Haskell, 327 F. 2d 281 (1964), 2nd Circuit

U. S. v. Kenney, 236 F. 2d 128 (1956), 3rd Circuit

U. S. v. Stradley, 295 F. 2d 33 (1961), 4th Circuit

U. S. v. Gordon, 410 F. 2d 1121, 5th Circuit

U. S. v. Dolleris, 408 F. 2d 918 (1969), 6th Circuit

U. S. v. Thayer, 209 F. 2d 534 (1954), 7th Circuit

Cline v. U. S., 395 F. 2d 138 (1968), C.A. 8th Circuit

Clark v. U. S., 293 F. 2d 445 (1961), 9th Circuit

Jaben v. U. S., 349 F. 2d 913 (1965), C.A. 10th Circuit

In *Cooper v. U. S.*, 321 Fed. 2d 274 (5th Cir., 1963), Honorable Griffin B. Bell said, at page 277:

> "We affirm the principle enunciated in Jackson, but we must go further and determine whether the failure to rule constituted harmful error. There can be no error if the evidence was sufficient to sustain a conviction when the government rested. 28 U.S.C.A. Section 2111. And for the purposes of our holding we assume without deciding, that the objection to the failure to rule was adequate, and that there was no waiver otherwise."

See, also, *Weathers v. U. S.*, 322 Fed. 2d 566 (9th Circuit).

It would appear from the foregoing that if it is error for the trial court to withhold ruling on a motion for judgment of acquittal made at the conclusion of the government's case, a Court of Appeal should decide said motion based only on that evidence of record at the time it was made.

In the case of *Cephus v. United States*, 324 Fed. 2d 893, 898 (D.C.), Circuit Judge Wright precisely covered the point involved as follows:

> "The fact that exculpatory evidence offered by his co-defendant implicated appellant in the crime cannot deprive appellant of his rights under Rule 29 (a). Nor can appellant's efforts, in introducing evidence in his own behalf to offset his co-defendant's evidence, trigger the invocation of the waiver doctrine. Whatever continued validity that archaic doctrine may have, it certainly has no application to the facts of this case. Indeed, a simple reading of Rule 29(a) indicates that the waiver doctrine is without validity in any case. A defendant cannot be boxed out of his Rule 29(a) rights by forcing him to go to trial with a co-defendant or by waiting hopefully for him to convict himself."

Therefore, if the government failed to prove petitioner's

signature on the returns in chief, petitioner was entitled as a matter of right to a judgment of acquittal. Failure thereof requires that this Court enter a judgment of acquittal.

III

THE TRIAL COURT'S REFUSAL TO GIVE A REQUESTED JURY CHARGE WHICH STATES IN SUBSTANCE THAT EVIDENCE OF GOOD CHARACTER STANDING ALONE MAY CREATE A REASONABLE DOUBT AS TO A DEFENDANT'S GUILT, CONSTITUTES REVERSIBLE ERROR WHERE THE DEFENDANT HAS INTRODUCED CONSIDERABLE EVIDENCE OF HIS GOOD CHARACTER.

Petitioner submitted Special Charge Number 17 in which he requested that the Trial Court instruct the jury as follows:

> "The defendant in this case has introduced evidence as to his general reputation in the community for truthfulness, veracity, and honest dealings. This evidence has been admitted because it is relevant in this case to show whether or not the defendant possesses traits of character inconsistent with his commission of the offenses charged. I instruct you that you are free to consider this testimony as to defendant's character and you may find from such testimony **alone** that a reasonable doubt exists as to defendant's guilt of the offenses charged." (AP 33)

The District Court instructed the jury as follows:

> "Gentlemen, the question of good character has been raised and I charge you that 'good character,' when considered in connection with all of the other evidence in the case may, of itself, generate a reasonable doubt. Proof of

uniform good character may raise a doubt of guilty knowledge and if it does, the defendant is entitled to the benefit of that doubt. Proof of good character may in some cases be the only means by which a defendant can raise a doubt as to his guilt. While proof of good character is not necessarily proof of innocence, it may, nevertheless, be sufficient to raise a doubt as to guilt. The jury might give much weight to evidence of good character, bearing in mind that evidence of good character, when considered with all of the other evidence, may be sufficient in itself to create a reasonable doubt of guilt. In arriving at your verdict, you must consider all of the evidence in the case." (AP 911)

The instruction given by the district court is almost identical with and basically the same language which was disapproved in *Holland v. U. S.*, 245 Fed. 2d 341, 342:

"The Court below instructed the jury, '* * * if the evidence with regard to good character, to good reputation, is sufficient when considered with all the other evidence in the case to create in your mind a reasonable doubt of his guilt then it is your duty to acquit him upon that evidence, including that of good character.' The problem narrows therefore to whether this instruction fairly apprised the jury that in some circumstances '* * * that such testimony alone * * * may be enough to raise a reasonable doubt of guilt * * *' Michelson v. United States, 335 U. S. 469, 69 S. Ct. 213, 219, 93 L. Ed. 168, 174, and this is so even though '* * * without it the other evidence would be convincing,' Edgington v. United States, supra."

* * *

"It is unnecessary to make an extended analysis of the

cases. While the trial judge correctly instructed the jury that the good character evidence was to be considered along with all the evidence and if a reasonable doubt was created, they should acquit, this instruction '* * * is drawn too narrowly. It does not tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing.' Hayes v. United States, 10 Cir., 227 F. 2d 540, 545."

Even though the above pronouncements were modified or overruled by the Court of Appeals for the 5th Circuit in *Moore v. U. S.*, 254 F. 2d 213, they represent the well reasoned views of the 7th and District of Columbia Courts of Appeals.

Moore v. U. S., 254 Fed. 2d 213, 221:

"The final point concerns the objections to the charge as given and the refusal of the Court to grant a requested charge on evidence of good reputation. The Court gave one in substantial accord with our prior decisions, Le More v. United States, 5 Cir., 253 F. 887, certiorari denied 248 U.S. 586, 39 S. Ct. 184, 63 L. Ed. 434, and Grace v. United States, 5 Cir. 4 F. 2d 658, certiorari denied 268 U. S. 702, 45 S. Ct. 637, 69 L. Ed. 1165, unaware at the time of the trial of our decision in Holland v. United States, 5 Cir., 245 F. 2d 341, which was not published until after the trial. In this record with its devastating facts, both direct and circumstantial, we would not have reached a conclusion that any such difference in the wording between the requested and given instructions could have had any harmful effect. United States v. Kushner, 2 Cir., 135 F. 2d 668, certiorari denied 320 U.S. 212, 63 S. Ct. 1449, 87 L. Ed. 1850. Nevertheless, since trial courts are entitled to guides as clear as can be

fashioned, we think it unsound to undertake any comparative analysis of the instructions here requested in contrast to those given by the Court or those criticized in Holland. Rather we should state plainly that in Holland neither by briefs nor argument were our prior decisions in Le More and Grace called to our attention. Those cases represented the law in this Circuit, see Kreiner v. United States, 2 Cir., 11 F. 2d 722, at page 726, certiorari denied 271 U.S. 688, 46 S. Ct. 639, 70 L. Ed. 1152. The contrary holding in Holland is disapproved so that these two prior decisions continue their vitality."

In *Carnley v. U. S.*, 274 Fed. 2d 68, 69, the court said:

"In appellee's petition for rehearing, our attention is directed for the first time to our case of Moore v. United States, 5 Cir., 1958, 254 F. 2d 213, which the appellee contends expressly overrules Holland v. United States, 5 Cir., 1957, 245 F. 2d 341, referred to in our opinion in this case filed January 7, 1960. Examination reveals that Moore disapproved the holding in Holland only insofar as that decision sanctions the rule deducible from the language of the Supreme Court in Edgington v. United States, 1896, 164 U.S. 361, 17 S. Ct. 72, 74, 41 L. Ed. 467, that where reputation of a defendant in a criminal case is in issue, the trial court may not refuse to charge the jury that 'The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing."

The conclusion of the United States Court of Appeals for the 5th Circuit that the trial court properly instructed the jury as to evidence of good character seems in direct conflict with *Michelson v. U. S.*, 335 U.S. 469, 69 S. Ct. 213, 219:

"This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case **should** be so instructed." (Emphasis supplied)

Petitioner's trial was certainly one which justified and required the charge being given as requested in special charge number 17 since he has been a public servant most of his adult life, i.e., La. State Representative 1948-1952, 1956-1960, District Attorney 1960 to-date (AP 619).

The United States District Court of Appeals for the 5th Circuit at page 5 of its opinion (footnote 4) cites the case of *Oertle v. U. S.*, 370 Fed. 2d 719, for the proposition that the tenth circuit Court of Appeals now approves the trial court's charge in the instant case. The following shows that the Court of Appeals for the 5th Circuit was in error.

Oertle v. U. S., supra, page 727:

"A reconsideration of Edgington and Michelson convinces us they do not compel the giving of the 'standing alone' instruction in every case in which evidence of good character has been admitted. The circumstances of a particular case may require it, as stated in both Edgington and Michelson. Such circumstances would certainly exist when an accused presented only evidence of good character and rested his defense upon this evidence coupled with the failure of the prosecution to sustain the burden of proof. There may be other circumstances requiring the giving of such instruction but we will not attempt here to anticipate them. We are concerned only with the circumstances presented by this record."

The tenth circuit recognizes that in certain situations the charge as to good character as stated above in *Holland v. U. S.* (supra) should be given. For a discussion and analysis of the majority and minority views concerning petitioner's special charge number 17 the court's attention is directed to 33 FRD 523, 584-585, and *Awkard v. U. S.*, 352 F. 2d 641 (CA-DC).

Petitioner submits that because of the unusual factual situation of his particular case the refusal of the Trial Court to give his special charge number 17 constitutes reversible error.

CONCLUSION

In conclusion, it is respectfully requested that a Writ of Certiorari be granted and after due consideration a judgment of acquittal be entered or, in the alternative, petitioner's conviction be reversed and he be granted a new trial.

Respectfully submitted,

D'AMICO, CURET & BUSH

By: _____
Sam J. D'Amico
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition has been served on

(1) The United States Court of Appeals for the Fifth Circuit, State of Louisiana;

(2) The United States District Court for the Eastern District of Louisiana, Baton Rouge Division; and

(3) Gerald J. Gallinghouse, United States Attorney, and H. P. Rowley, III, Assistant United States Attorney for the Eastern District of Louisiana, by depositing same in the U. S. mail, with first class postage prepaid, and properly addressed to the respective addresses.

Baton Rouge, Louisiana, this _____ day of February, 1970.

_____

Sam J. D'Amico

APPENDIX

ARGUMENT AND SUBMISSION.

Extract from the Minutes of October 22, 1969.

UNITED STATES OF AMERICA

No. 27373 *versus*

SAMUEL C. CASHIO,

On this day this cause was called, and after argument by Sam J. D'Amico, Esq., for appellant and H. P. Rowley, III, Esq., Asst. U. S. Attorney, for Appellee, was submitted to the Court.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27373

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAMUEL C. CASHIO,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(December 9, 1969)

Before GOLDBERG, DYER and CARSWELL, Circuit Judges.

DYER, Circuit Judge: Cashio appeals from a judgment entered on a jury conviction of four counts for willfully and knowingly making and subscribing false income tax returns in violation of 26 U.S.C.A. § 7206(1). He complains that eleven errors were committed by the trial court, seven of which, however, were not raised before or during the trial. Although he "fired all barrels at all possible targets, moving or not moving, real or imaginary," *Butler v. United States*, 5 Cir. 1969,

402 F.2d 748, 749, we conclude that Cashio's aim was close enough only three times to merit comment but that he never hit the bull's eye. We therefore affirm.

After the government rested its case Cashio moved for a judgment of acquittal asserting that there was a failure of proof of an essential element of the crime charged because no evidence had been introduced to prove that the defendant had signed the four income tax returns in question. The motion was denied, and Cashio subsequently testified that he had signed the returns. Cashio argues that we should look only to the Government's evidence at the close of its case to determine whether there was sufficient proof of all of the essential elements of the crime as charged. This argument has no merit because:

> "It is the settled rule in this Circuit that when a defendant, after denial of a motion for acquittal at the close of government's case, introduces evidence in his own behalf, his motion is abandoned and the reviewing court may consider all the evidence and the entire record." (Citations omitted) *United States v. Gordon*, 5 Cir. 1969, 410 F.2d 1121, 1122.

Rule 29(a), F.R.Crim.P. is not to the contrary as Cashio suggests. The rule simply preserves the right of a defendant to offer evidence even though his motion is denied and he has not reserved the right to do so.[1] *See* 2 C. Wright, *Federal*

[1] The Advisory Committee Note to Rule 29(a) when originally promulgated said in pertinent part: "3. The purpose of the third sentence is to remove the doubt existing in a few jurisdictions on the question whether the defendant is deemed to have rested his case if he moves for a directed verdict at the close of the prosecution's case. The purpose of the rule is expressly to preserve the right of the defendant to offer evidence in his own behalf, if such motion is denied. This is a restatement of the prevailing practice, and is also in accord with the practice prescribed for civil cases by Rule 50(a) of the Federal Rules of Civil Procedure."

Practice and Procedure, § 463 (1969). It is clear, therefore, that we may consider the entire record, including Cashio's admissions. In doing so it is manifest that there was no error in submitting the case to the jury because a reasonably-minded jury might have accepted the relevant evidence as adequate to support a conclusion of Cashio's guilt beyond a reasonable doubt. *Sanders and Buschkotter v. United States,* 5 Cir. 1969, ____ F.2d ____ [No. 25932, August 11, 1969]; *Grant v. United States,* 5 Cir. 1969, 407 F.2d 56; *Jones v. United States,* 5 Cir. 1968, 391 F.2d 273; *Lambert v. United States,* 5 Cir. 1958, 261 F.2d 799.

Even if the rule urged by Cashio—that the reviewing court may look only to the state of the evidence as it existed at the time the motion for judgment of acquittal was denied—were the law in this Circuit, the trial court's denial of the motion would still be sustained.[2] There was sufficient evidence to take the case to the jury even before Cashio admitted that the signatures were his.

Cashio's name was signed to each of the four tax returns that had been offered by the government and received in evidence.

It was undisputed that the genuine signature of Cashio appeared on other documents that were in evidence. Without more, the jury was entitled to make a comparison of the handwriting of Cashio known to be genuine with the signature appearing on the returns and decide whether Cashio had signed the returns. *Strauss v. United States,* 5 Cir. 1963, 311 F.2d 926, *cert. denied,* 373 U.S. 910; *Dean v. United States,* 5

[2] We do not, by embarking upon this discussion, intend to question the least bit the rule of *United States v. Gordon, supra.* Our purpose is merely to show that the trial judge was correct in denying the motion for judgment of acquittal at the time of his ruling.

Cir. 1917, 246 F. 568. In addition, the Government's case was bolstered by a rebuttable presumption that, since Cashio's name was signed to the returns, they were actually signed by him. 26 U.S.C.A. § 6064.[3] We disagree with Cashio's contention that the presumption created by statute is confined to civil cases. The statute explicitly creates a rebuttable presumption "for all purposes." *See United States v. Wainwright*, 10 Cir. 1969, 413 F.2d 796; *Desimone v. United States*, 9 Cir. 1955, 227 F.2d 864.

Cashio, relying on *Holland v. United States*, 5 Cir. 1958, 245 F.2d 341, next contends that the trial court should have given his requested charge which stated in substance that evidence of good character standing alone may create a reasonable doubt as to a defendant's guilt. The trial judge, however, charged that:

> "The jury might give much weight to evidence of good character, bearing in mind that evidence of good character, when considered with all of the other evidence, may be sufficient in itself to create a reasonable doubt of guilt. In arriving at your verdict, you must consider all of the evidence in the case."

Although the instruction requested by Cashio has been approved by the Seventh and District of Columbia Circuits, all of the other Circuits, including the Fifth, have held that the instruction given by the District Court was correct.[4] *Carnley*

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[3] 26 U.S.C.A. § 6064 provides:

> The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

[4] For cases supporting the majority and minority views see Manual on Jury Instructions—Criminal, 33 F.R.D. 523, 583-585 (1964). The Tenth Circuit, which had followed the minority rule for many years, has recently adopted the majority rule. *Oertle v. United States*, 10 Cir. 1966, 370 F. 2d 719.

v. United States, 5 Cir. 1960, 274 F.2d 68; *Moore v. United States*, 5 Cir. 1958, 254 F.2d 213; *Grace v. United States*, 5 Cir. 1925, 4 F.2d 658; *LeMore v. United States*, 5 Cir. 1918, 253 F. 887.[5] Accordingly, the District Court was not in error in refusing to give the instruction requested by Cashio.

Cashio moved for a new trial based on a juror's alleged disqualification. It was supported by an affidavit made by a stranger to the litigation to the effect that the juror had met with Cashio between six and eight years before the trial for about fifteen minutes, at which times matters entirely unrelated to the case were discussed. There were also conclusory statements concerning animosity between the parties. The Government responded with a counter-affidavit by the juror in which he denied the conclusory allegations of the initial affidavit. At the hearing on the motion Cashio produced no evidence and the stranger who made the affidavit did not testify. At that hearing Cashio moved to interrogate the juror. Both motions were denied. Cashio asserts that a new trial should have been granted because the juror concealed material facts and because the denial of his motion to interrogate the juror was an abuse of discretion. We disagree.

The trial judge found that the juror did not improperly withhold any information, and that the juror did nothing which "constitutes any prejudicial error of any kind in my opinion." A careful review of the record fully supports the Court's finding.[6] Cashio himself did not recognize the juror or recall the meetings.

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[5] *Holland v. United States*, 5 Cir. 1957, 245 F.2d 341, holding *contra* was disapproved and overruled in *Moore supra*.

[6] The jury as a whole was asked if they were acquainted with the defendant. The juror stated by affidavit that he did not respond because he interpreted this question to mean socially acquainted and it did not suggest a disclosure of the two brief meetings years before this

Of course prejudice is not presumed. Cashio had the burden of proving prejudice by a preponderance of the credible evidence. *Harris v. United States*, 9 Cir. 1969, 412 F.2d 384; *Brown v. United States*, 10 Cir. 1966, 356 F.2d 230; *Lancaster v. United States*, 5 Cir. 1930, 39 F.2d 30; *United States v. Provenzano*, D.N.J. 1965, 240 F. Supp. 393, *aff'd*, per curiam, 353 F.2d 1011, *cert. den.* 384 U.S. 905. He utterly failed to carry this burden. Nor did the trial court err in denying Cashio's motion to interrogate the juror. At the hearing Cashio produced no witnesses, not even the affiant. In these circumstances we see no reason to require a juror to submit to post trial hearings to test his integrity, especially where the trial judge can decide the motion on affidavits. *Cf. Glasser v. United States*, 1942; 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680; *United States v. Troche*, 2 Cir. 1954, 213 F.2d 401, Rule 46, F.R.Crim.P.

Whether a motion for new trial should be granted is a matter within the discretion of the trial court. *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150, 247, 60 S.Ct. 811, 84 L.Ed. 1129. Here there was no showing of abuse of discretion, because no prejudice was established.

We have considered and found without merit the other errors asserted by Cashio.

AFFIRMED.

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time. He stated further that he continued to be silent during further interrogation of the jury because he interpreted the questions to mean that he knew of no reason why he could not act as a juror and confine his deliberations and findings to findings of fact in accordance with the court's instructions, and that he knew of no reason why he could not sit as a fair and impartial juror.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27373

D. C. Docket No. Cr. 1513

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAMUEL C. CASHIO,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, DYER and CARSWELL, Circuit Judges.

J U D G E M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 9, 1969

Issued as Mandate:

U. S. Court of Appeals
FILED
JAN. 6, 1970
Edward W. Wadsworth
Clerk

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27,373

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SAMUEL C. CASHIO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

January 6, 1970

ON PETITION FOR REHEARING

Before GOLDBERG, DYER and CARSWELL,
Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.